No. 90-762

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THOMAS and SHARON FREYTAG, JOE and GLADYS WOMBLE, BERT and MILDRED TIMM, KENNETH and CANDACE MCCOIN,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF ERWIN N. GRISWOLD AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Congress has the power, under the Appointments Clause of the Constitution, to authorize the Chief Judge of the United States Tax Court to appoint special trial judges.

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INTRODUCTION

On February 19, 1991, this Court granted a motion by the *amicus* for leave to file this brief. This brief is filed to present to the Court a position that—while shared by the United States Tax Court itself (Pet. App. at A82-A87)—is supported by neither the petitioners nor the respondent in this case: that is, that the Tax Court is a "Court[] of Law" that may be authorized by Congress to appoint inferior officers consistent with the Appointments Clause of the Constitution.[1]

[1] The Court granted certiorari to review three issues. This brief, however, addresses only the second issue presented in the Petition, i.e., the propriety, under the Appointments Clause of the Constitu-

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article II, Section 2, of the Constitution of the United States, which is reproduced in Appendix E to the Petition (Pet. App. A99), and Section 7443A of the Internal Revenue Code, 26 U.S.C. § 7443A, which is reproduced in Appendix F to the Petition (Pet. App. A100).

STATEMENT

1. In 1924, Congress established "an independent agency in the executive branch of Government" to adjudicate certain disputes arising under the federal tax laws. Revenue Act of 1924, ch. 234, § 900(a), (k), 43 Stat. 253, 336, 338. This independent agency, named the Board of Tax Appeals ("Board"), consisted of limited-tenure Board members appointed by the President, with the advice and consent of the Senate. *Id.*, § 900(b), 43 Stat. 336. Congress gave the Board limited jurisdiction to decide certain pre-payment disputes, i.e., tax deficiencies and claims in abatement. *Id.*, §§ 274, 279, 43 Stat. 297, 300.

Over the next half-century, Congress took several steps to give this executive agency attributes more indicative of a court. *See* H. Dubroff, *The United States Tax Court, An Historical Analysis* 161-64 (1979). In 1926, just two years after creating the Board, Congress recognized that the Board's decisions were "judicial and not legislative or administrative" (S. Rep. No. 52, 69th Cong., 1st Sess. 37 (1926)), and provided for direct review of those decisions in the federal courts of appeals.

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tion, of appointment of special trial judges by the Chief Judge of the Tax Court pursuant to the specific authorization of Congress. The *amicus* agrees with the Respondent on the first issue presented in the Petition. The *amicus* does not address the third question before the Court concerning waiver by the petitioners of their constitutional challenge.

Revenue Act of 1926, ch. 27, §§ 1001, 1003(a), 44 Stat. 9, 109-110. In 1942, while continuing the tribunal's status as an executive agency, Congress passed legislation that renamed both the Board and its members as the "Tax Court of the United States" and "judges," respectively. Revenue Act of 1942, ch. 619, § 504, 56 Stat. 798, 957. And, in 1948, Congress provided specifically that the Tax Court's decisions were reviewable in the federal courts of appeals under the same standards as those applicable to non-jury decisions of the federal district courts. Act of June 25, 1948, ch. 646, § 36, 62 Stat. 869, 991.

In 1969, Congress took the final step and changed the Tax Court's status from that of an executive agency to a court. Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730. In the words of the statute, Congress established "a court of record to be known as the United States Tax Court," and it was explicit in saying that it took this action "under Article I of the Constitution of the United States." 26 U.S.C. § 7441; *see* S. Rep. No. 552, 91st Cong., 1st Sess. 303 (1969) (expressing intent to "make[] the Tax Court an Article I court rather than an executive agency").[2] Con-

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[2] This action by Congress is supported by two clauses of Article I, § 8, of the Constitution—the power to "lay and collect taxes" (clause 1) and the power to make all laws "necessary and proper" to execute that authority (clause 18). Reference may also be made to the power given to Congress by Article 1, § 8, cl. 9, of the Constitution "[t]o constitute Tribunals inferior to the supreme Court." In his opinion in *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962), Justice Harlan said that this provision "plainly relates to the 'inferior Courts' provided for in Art. III, § 1; it has never been relied on for establishment of any other tribunals." It should be noted, though, that only two other Justices concurred in Justice Harlan's opinion. Three observations may be made: (1) no majority of this Court has ever *decided* that Article I, § 8, cl. 9, is limited to Article III courts; (2) had the Founding Fathers intended to limit clause 9 to Article III courts, they would have used the word "Courts," as used in Article III, rather than the broader word "Tribunals"; and (3) the

current with this change in status, Congress gave the Tax Court the authority, *inter alia*, to enforce its own process and to punish contempt of its orders; it also empowered the Tax Court to appoint full-time commissioners to assist its judges for indefinite terms. Pub. L. No. 91-172, § 956, § 958, 83 Stat. 732, 734.[3]

In 1984, after over a decade of gradually expanding the decision-making role of the Tax Court's commissioners (Pet. App. A90-A91), Congress changed the name of these commissioners to "special trial judges" and prescribed the current categories of proceedings in which they could render decisions. Tax Reform Act of 1984, Pub. L. No. 98-369, § 464, 98 Stat. 494, 824. Thus, in the current Section 7443A of the Internal Revenue Code, Congress authorized the Chief Judge of the Tax Court to "appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court." 26 U.S.C. § 7443A(a). It further provided that the Chief Judge could assign special trial judges to hear (1) declaratory judgment proceedings; (2) proceedings under Section 7463 of the Code; (3) small cases involving less than $10,000; and (4) "any other proceeding which the chief judge may designate to be heard by the special trial judges of the court." 26 U.S.C. § 7443A(b). Congress provided, however, that these special trial judges could issue "the decision of the court" in only the first three types of proceedings. 26 U.S.C. § 7443A(c).

Appointments Clause is in Article II, where it is as relevant to Article I as it is to Article III.

There is no need to resolve this issue here since Article I, § 8, and the "necessary and proper" clause provide adequate authority for Congress to establish the United States Tax Court and to allocate to it an appropriate portion of the judicial power.

[3] This authority to appoint commissioners was not entirely new. Since 1939, as an executive agency, the Board had possessed the authority to appoint commissioners to assist the Board in particular cases. Pet. App. A90.

2. This case began with determinations of deficiencies against the petitioners, who had attempted to deduct losses, allegedly realized on investments in a tax shelter scheme, on their federal income tax returns. Pet. App. A2. Petitioners filed their petitions in the Tax Court for review of these determinations. Their cases were ultimately assigned for trial to a special trial judge of the Tax Court, who concluded that the tax shelter scheme consisted of sham transactions and that the petitioners owed additional taxes. *Id.* at A47. The Chief Judge adopted this decision of the special trial judge as the decision of the Tax Court. *Id.* at A14.[4]

The petitioners appealed to the United States Court of Appeals for the Fifth Circuit, arguing (1) that the Tax Court erred in holding that the tax shelter scheme was a sham, and (2) that the assignment of their cases to a special trial judge was contrary to both Section 7443A(b)(4) of the Internal Revenue Code and the Appointments Clause of the Constitution. The court of appeals, however, affirmed the decision of the Tax Court. Pet.

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[4] The petitioners make much of the fact that "[t]he special trial judge's filing of his report and its verbatim adoption by Chief Judge Sterrett appear from the record to have been virtually simultaneous." Pet. Br. 8. Quite apart from the fact that the burden of proof on this question was on the taxpayer, the suggestion overlooks the fact that Chief Judge Sterrett acted in two different capacities in this case: (1) he was the judge assigned to review the work of the special trial judge—and there is nothing whatever in the record to show how long or how frequently he worked on this task—and (2) he was the Chief Judge of the Tax Court who, under Section 7460(b) of the Internal Revenue Code, had the responsibility to determine whether this case was one that should be "reviewed by the Tax Court" (that is, set down for *en banc* hearing). Since he was already familiar with the case because of his consideration of it under the first of these capacities, it is hardly surprising that, when the final draft came to him, he had already concluded that it was not a case that should be "reviewed by the Tax Court." In this situation, it was clearly his duty to enter the final order forthwith, when the report came back to him after his first review.

App. A1-A13. It concluded that the Code authorized the Tax Court to assign a special trial judge to hear petitioners' cases (*id.* at A6-A7), that the petitioners had waived any constitutional challenge to this appointment by consenting to a trial before a special trial judge (*id.* at A8 n.9), and that the Tax Court had properly sustained the disallowance of petitioners' claimed deductions (*id.* at A8-A13).[5]

SUMMARY OF ARGUMENT

Congress constitutionally vested the Chief Judge of the United States Tax Court with the authority to appoint special trial judges. The Appointments Clause of the Constitution makes clear that Congress may vest authority to appoint inferior officers, like the Tax Court's special trial judges, "in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, § 2. The Tax Court is plainly a "Court[] of Law" within the meaning of this Clause. It is a "court" created pursuant to Congress' powers under Article I of the Constitution; it exercises judicial power in interpreting the tax laws of the United States, subject to review in the Article III courts of appeals; and it functions in all respects like a court.

That the Tax Court is a legislative court, rather than an Article III constitutional court, does not mean that

[5] The constitutionality of the Tax Court as an Article I court has not been challenged in this case, and has been uniformly recognized by the courts of appeals that have reached this issue. *See Shenker v. Commissioner*, 804 F.2d 109, 114 n.6 (8th Cir. 1986); *Sauers v. Commissioner*, 771 F.2d 64, 69 n.6 (3d Cir. 1985), *cert. denied*, 476 U.S. 1162 (1986); *Simanonok v. Commissioner*, 731 F.2d 743, 744 (11th Cir. 1984); *Sparrow v. Commissioner*, 748 F.2d 914, 915 (4th Cir. 1984); *Knoblaugh v. Commissioner*, 749 F.2d 200, 202 (5th Cir. 1984), *cert. denied*, 474 U.S. 30 (1985); *Redhouse v. Commissioner*, 728 F.2d 1249, 1253 n.2 (9th Cir.), *cert. denied*, 469 U.S. 1034 (1984); *Knighten v. Commissioner*, 705 F.2d 777, 778 (5th Cir.), *cert. denied*, 464 U.S. 897 (1983).

it is not a "Court[] of Law" under the Appointments Clause. Nothing in the text of the Appointments Clause restricts the phrase "Courts of Law" in that manner. Rather, a fair and natural construction of those words leads to the conclusion that they encompass courts—including Article I courts—that administer, interpret and apply the laws of the United States. This construction comports with Congress' consistent and long-standing interpretation of the Appointments Clause and this Court's decisions sustaining the constitutionality of legislative courts.

Separation-of-powers principles do not require this Court to hold that the Tax Court is not a "Court[] of Law" or that it is, instead, a "Department." Congress made clear, in 1969, that the Tax Court is a "court"—not a department within the Executive Branch of the federal government. This designation does not pose significant separation-of-powers concerns. The structure of the Tax Court effectively shields the Chief Judge of the Tax Court from legislative efforts to exert undue influence over the appointments process; except by impeachment, applicable to all civil officers, Congress can remove neither the Tax Court Judges nor the appointed special trial judges. No genuine separation-of-powers concerns would thus be advanced by cloaking the Tax Court with the artificial designation of a "Department" for purposes of the Appointments Clause.

ARGUMENT

CONGRESS HAS POWER UNDER THE CONSTITUTION TO AUTHORIZE THE APPOINTMENT OF SPECIAL TRIAL JUDGES BY THE CHIEF JUDGE OF THE UNITED STATES TAX COURT

The Appointments Clause of the Constitution provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, § 2, cl. 2, last sentence. In Section 7443A of the Internal Revenue Code, Congress did "by Law vest" the Chief Judge of the Tax Court with the authority to appoint special trial judges. 26 U.S.C. § 7443A. These special trial judges, moreover, are properly deemed "inferior Officers" within the meaning of the Appointments Clause.[6] The constitutionality of the Chief Judge's appointment of these inferior officers thus turns on whether the Tax Court is a "Court[] of Law" (as the Tax Court and the *amicus* contend) or, alternatively, whether the Chief Judge is the "Head[] of [a] Department[]" (as the Respondent contends). The Tax Court's functions, viewed in light of the plain meaning and historical interpretation of the phrase "court of law," make plain that the Tax Court is a "Court[] of Law" empowered to appoint inferior officers under the Appointments Clause.

[6] *Cf. Morrison v. Olson*, 487 U.S. 654, 670-73 (1988) (independent counsel appointed under Ethics in Government Act was "inferior officer"); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (commissioners of Federal Election Commission are at least "inferior officers"); *Matter of Hennen*, 13 Peters 230, 257-58 (1839) (clerks of the district courts are "inferior officers").

A. The Tax Court Is A "Court[] Of Law" Within The Meaning Of The Appointments Clause Of The Constitution

1. The Tax Court's functions serve to define its constitutional status and its role in the constitutional scheme. *See Williams v. United States*, 289 U.S. 553, 563-567 (1933).[7] The United States Tax Court is a "court of the United States" exercising judicial, rather than executive, legislative or administrative, power. As such, it naturally falls within the phrase "Courts of Law" as the Framers used those words in the Appointments Clause.

The Tax Court, which Congress created pursuant to its powers under Article I of the Constitution (*see* 26 U.S.C. § 7441), plainly functions as a court of law. Congress set up the Tax Court as an independent tribunal to interpret and apply the Internal Revenue Code in disputes between taxpayers and the Government; it thus exercises an appropriate segment of the "judicial power" of the United States. The Tax Court, moreover, dispenses that power in much the same way as the federal district courts—courts that are indisputably "Courts of Law." Indeed, the Tax Court has authority to punish contempt of the court by fine or imprisonment (26 U.S.C. § 7456(c); *see Trihimovich v. Commissioner*, 77 T.C. 252 (1981)); to issue injunctions (26 U.S.C. § 6213(a)); to enforce its decisions by ordering the Secretary of the Treasury to refund an overpayment determined by the

[7] This Court has adopted such a practical and functional approach in similar contexts. *See Forrester v. White*, 484 U.S. 219, 228 (1988) (whether judicial immunity applies to an act of a judge depends on whether the act is judicial in character); *Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress may not exercise removal power over officer performing executive functions); *Humphrey's Executor v. United States*, 295 U.S. 608, 630-31 (1935) (President cannot discharge members of the Federal Trade Commission because the statutory functions of the Commission are not purely executive in nature).

court (26 U.S.C. § 6512(b)(2)); and to subpoena witnesses, order production of documents, administer oaths, and examine witnesses (26 U.S.C. § 7456(a)). All of these powers of the Tax Court are quintessentially judicial in nature.

The Tax Court's role in our tripartite form of government serves to underscore its status as a court of law within the meaning of the Appointments Clause. The decisions of the Tax Court are not subject to review by either the Congress or the President. Nor has Congress made them subject to intermediate review in the federal district courts. Rather, like the decisions of the federal district courts, the decisions of the Tax Court are directly appealable only to the United States Courts of Appeals, with ultimate review in this Court. *See* 26 U.S.C. § 7482(a). The Courts of Appeals, moreover, review those decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." *Id.*

Thus, even before Congress expressly constituted the Tax Court as an Article I court and expanded its judicial powers in 1969, the Courts of Appeals properly recognized that the powers and functions of the Tax Court and its predecessors were judicial in nature. *See Uncasville Mfg. Co. v. Commissioner*, 55 F.2d 893, 897 (2d Cir. 1932) (Judge Learned Hand) (the Board of Tax Appeals "acts as a judicial body"); *Stern v. Commissioner*, 215 F.2d 701, 707 (3d Cir. 1954) (Tax Court's "powers are wholly judicial in character"); *Reo Motors Inc. v. Commissioner*, 219 F.2d 610, 612 (6th Cir. 1955) (stating that the Tax Court "is a court exercising inherently judicial functions and having the necessary judicial powers to carry out such functions"). The Tax Court's functions and role in the federal judicial scheme, accordingly, provide ample support for the conclusion

that it is a "Court[] of Law" under the Appointments Clause.[8]

2. Nothing in the simple reference to "the Courts of Law" in the Appointments Clause limits the power of appointment "to those courts created and existing under Article III as part of the Judicial Branch." Pet. Br. 33. It is, of course, true that "[t]he Constitution nowhere makes reference to 'legislative courts.'" *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962). But the fact that Article III courts are the only courts that the Constitution authorizes *eo nomine* does not mean, as petitioners argue (Pet. Br. 34), that Article II's reference to "Courts of Law" is limited exclusively to such courts.

a. The *text* of the Appointments Clause plainly does not limit "Courts of Law" to only those courts established under Article III of the Constitution. It nowhere specifically provides that Congress can vest appointment powers only in "one supreme Court" and other courts created under Article III, or only in non-"public rights" tribunals that exercise broad common law jurisdiction. Nor is there reason to believe that the Framers intended the simple words "Courts of Law" to carry such a restrictive meaning; indeed, although the Framers adopted this language in the Appointments Clause with little comment, they plainly intended to give Congress broad discretion to determine where appointment authority should lie. *See*

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[8] The Respondent agreed with this common-sense interpretation of the Appointments Clause in the court below, advocating the position that the Tax Court is a "Court[] of Law" under that Clause. *See* Brief for the Appellee Commissioner of Internal Revenue, Nos. 89-4436, 4439, 4440, & 4450 (5th Cir.), at 47-51. In a later case presenting this same constitutional issue, however, the Respondent abandoned that position, arguing that the Tax Court is not a "Court[] of Law," but that it can be regarded as a "Department" within the Executive Branch. *See* Brief for the Appellee Commissioner of Internal Revenue, *Samuels, Kramer & Co. v. Commissioner*, Nos. 90-4060 & 90-4064 (2d Cir., decision pending), at 34-48.

Morrison v. Olson, 487 U.S. at 673-74. To give the words "Courts of Law" anything but their plain and natural meaning—i.e., "courts" that administer, interpret and apply the laws of the United States (*see* Black's Law Dictionary, at 323 (5th ed. 1989))—would do violence to both the text and intent of the Constitution.[9]

b. This fair and natural construction of the phrase "Courts of Law" comports with Congress' consistent and long-standing interpretation of the Appointments Clause. "[F]rom the earliest days of the Republic" (*Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982)), Congress provided for the creation of "legislative" courts (including those empowered to adjudicate "public rights") and authorized those courts to appoint inferior officers of the United States—thus showing the clear understanding of Congress that the Appointments Clause did not preclude these courts from making such appointments. Because "'traditional ways of conducting government . . . give meaning' to the Constitution" (*Mistretta v. United States*, 488 U.S. 361, 401 (1989), quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)), this long-established and time-honored interpretation provides compelling evidence that Article I courts are "Courts of Law" under the Appointments Clause.

Since the early 1800s, Congress regularly granted territorial courts the authority to appoint their own clerks

[9] This Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), does not compel a contrary conclusion. While the Court in *Buckley* paraphrased the Appointments Clause to allow the appointment of inferior officers "by the President alone, by the heads of departments, or by the Judiciary" (*id.* at 132), the Court did not hold, as petitioners suggest (Pet. Br. 33-34), that "Courts of Law" consist only of the Article III Judiciary. Indeed, the appointment authority of the "Courts of Law" was not before the Court in *Buckley*; the Court was, instead, concerned with whether the appointment of Federal Elections Commissioners by Congress was constitutional under the Appointments Clause.

of court who, as of at least 1839, were undeniably "inferior officers" within the meaning of the Appointments Clause. *See Matter of Hennen*, 13 Peters 230, 257-58 (1839). For example, in 1804, Congress created the courts of the territory of Orleans and vested them with "judicial power." Act of Mar. 26, 1804, ch. 38, §§ 5-7, 2 Stat. 283, 284-85. It provided for Presidential appointment of judges for these courts who, with the advice and consent of the Senate, would serve for four-year terms, and granted these judges authority to "appoint their own clerk." *Id.* The territorial courts that Congress subsequently created followed this same model: Congress (1) vested "the judicial power"—using those words—in courts whose judges were appointed by the President with the advice and consent of the Senate for a term of years and (2) granted these non-Article III judges the authority to appoint clerks of the court. *See, e.g.*, Act of June 4, 1812, ch. 95, § 10, 2 Stat. 743, 746 (territory of Missouri); Act of Mar. 2, 1819, ch. 49, § 7, 3 Stat. 493, 495 (territory of Arkansaw); Act of Mar. 30, 1822, ch. 13, § 6, 3 Stat. 654, 656 (territory of Florida); Act of June 12, 1838, ch. 96, § 9, 5 Stat. 235, 237-39 (territory of Iowa); Act of Mar. 2, 1853, ch. 82, § 9, 10 Stat. 172, 175-76 (territory of Washington); Act of Mar. 3, 1863, ch. 117, § 9, 12 Stat. 808, 811-12 (territory of Idaho); Act of Apr. 30, 1900, ch. 339, § 86, 31 Stat. 141, 158 (territory of Hawaii); Act of Mar. 2, 1917, ch. 145, § 41, 39 Stat. 951, 965 (territory of Puerto Rico); Act of Aug. 1, 1950, ch. 512, § 24(c), 64 Stat. 384, 390 (Guam); *cf.* Act of July 22, 1954, ch. 558, § 27, 68 Stat. 497, 507 (granting territorial court of the Virgin Islands authority to appoint a U.S. Attorney to fill a vacancy until the vacancy was filled by Presidential appointment following confirmation). Congress likewise granted similar authority to courts in the District of Columbia. *See* Appendix, *infra*, at 25-26 (summarizing history of District of Columbia courts).[10]

[10] Petitioners seek to render this congressional action "wholly inapposite" because Congress established these courts pursuant to

Congress has similarly created a number of other non-Article III courts and empowered them, like the territorial courts, to appoint inferior officers of the United States. For example, Congress in 1855 created the Court of Claims, which until 1953 was recognized as an Article I court (*Glidden Co. v. Zdanok*, 370 U.S. 530, 586-87 (1962) (Clark, J., concurring)), and granted the court the authority to appoint commissioners and a chief clerk of the court. Act of Feb. 24, 1855, ch. 122, §§ 3, 11, 10 Stat. 612, 613-14.[11] In 1891, Congress created the Court of Private Land Claims, another Article I court (*United States v. Coe*, 155 U.S. 76, 85-86 (1894)), and granted the court authority to appoint a clerk and deputy clerk. Act of Mar. 3, 1891, ch. 539, 26 Stat. 854, 855. And, in 1902, Congress created the Choctaw and Chickasaw Citizenship Court, an Article I court whose judges similarly were granted the authority to appoint a clerk and deputy

its "plenary" powers with respect to the District of Columbia and the territories. Pet. Br. 35 n.33. That Congress established the District of Columbia courts and the territorial courts under Article I, § 8, cl. 17, and Article IV, § 3, cl. 2, respectively, however, is a distinction without a difference in this case. The powers given to Congress with respect to taxes are no less "plenary" than those with respect to the District of Columbia and the territories. Congress has "plenary" power "[t]o lay and collect taxes . . ." (Art. I, § 8, cl. 1) and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof" (Art. I, § 8, cl. 18).

[11] In 1986, Congress gave the Claims Court—which is now an Article I court with judges of limited tenure—authority to appoint "special masters" to make findings of fact and conclusions of law under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-12(c). *See* Pub. L. No. 99-660, § 2112(c), 100 Stat. 3761 (1988). Petitioners contend that this appointment authority, like the Tax Court's appointment authority, violates the Appointments Clause, relying on the President's statement to that effect when he signed the legislation creating the vaccine special masters. Pet. Br. 40. That statement, however, is entitled to no binding weight in determining the meaning of the Constitution—a task that is ultimately for this Court.

clerk. Act of July 1, 1902, ch. 1362, § 33, 32 Stat. 641, 648; *see Wallace v. Adams*, 204 U.S. 415 (1907). All of these Article I courts, granted widely varying statutory jurisdictions, are identical in a few crucial respects: each is described by Congress as a "court"; each specifically has been vested by Congress with "judicial power," generally in those words; and each has been recognized by this Court as a "court" properly constituted pursuant to the Article I powers of Congress.[12]

Congress' long and undisturbed interpretation of the Constitution with respect to "legislative courts" is entitled to substantial deference. *See Mistretta v. United States*, 488 U.S. 361, 401 (1989); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 610. There can be little doubt that, in following its time-honored practice of granting these Article I courts the power to appoint inferior officers of the United States, Congress understood them to be "Courts of Law" within the meaning of the Appointments Clause. There is likewise little doubt that the Tax Court—which, for present purposes, is indistinguishable from these other Article I courts—can constitutionally be granted power to appoint its own inferior officers.

c. This Court's decisions upholding a variety of non-Article III courts similarly provide strong support for the conclusion that the Tax Court is a "Court[] of Law" within the meaning of the Appointments Clause. In the face of constitutional challenges to non-Article III courts —based on the literalistic argument (similar to petition-

[12] More recently, Congress established two more Article I courts: the United States Court of Veterans Appeals (38 U.S.C. § 4051 *et seq.*), whose decisions are subject to review in the United States Court of Appeals for the Federal Circuit and, ultimately, this Court (38 U.S.C. § 4092), and the United States Court of Military Appeals (10 U.S.C. §§ 942-44), whose decisions are subject to direct certiorari review in this Court (28 U.S.C. § 1259), a jurisdiction that would be unconstitutional unless the Court of Military Appeals is a "court" within this Court's appellate jurisdiction.

ers' argument here) that only Article III courts can exercise the "judicial power" of the United States—this Court has repeatedly sustained the constitutionality of the creation by Congress of so-called "legislative courts."

In *American Insurance Co. v. Canter*, 1 Peters 511 (1828), the first case to examine this issue, this Court held that the territorial court of Florida was a non-Article III legislative court and that it had proper jurisdiction to hear and decide admiralty cases. *Id.* at 546. In creating this court, Congress had vested it with "judicial power" and had provided that "[e]ach judge shall appoint a clerk for his respective court" (Act of March 30, 1822, ch. 13, 3 Stat. 654, 656)—evidencing the clear understanding of Congress that the "judicial power" was not limited to Article III courts and that legislative courts were "Courts of Law" under the Appointments Clause. Chief Justice Marshall, writing for the Court, specifically recognized the former proposition—that the judicial power of the United States was not limited to the judicial power defined under Article III and could be exercised by "legislative courts":

> These Courts . . . are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.

1 Peters at 546. While the Court had no occasion to address the appointment powers of these courts, Chief Justice Marshall carefully reviewed the powers granted the territorial court of Florida—without in any way intimating that any of the powers granted to the court were contrary to the Constitution or that the territorial

court was anything other than a court of law. *See id.* at 543-46.

This Court's later decisions involving Article I courts similarly refer to these tribunals as courts that exercise the "judicial power" of the United States. In *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), the unanimous Court held that the Court of Customs Appeals was an Article I court. In the Court's words, "[t]hat the court is a court of the United States is plain; but this is quite consistent with its being a legislative court." *Id.* at 460. Following similar reasoning, this Court (again unanimously) held in *Williams v. United States*, 289 U.S. 553 (1933), that the original Court of Claims was an Article I court, stating:

> The Court of Claims . . . undoubtedly . . . exercises judicial power, but the question still remains—and is the vital question—whether it is the judicial power defined by Art. III of the Constitution.
>
> That judicial power apart from that article may be conferred by Congress upon legislative courts, as well as upon constitutional courts, is plainly apparent from the opinion of Chief Justice Marshall in *American Insurance Co. v. Canter*, 1 Pet. 511, 546, dealing with the territorial courts. . . . [T]he legislative courts possess and exercise judicial power —as distinguished from legislative, executive, or administrative power—although not conferred in virtue of the third article of the Constitution.
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> • • • •
>
> If the power exercised by legislative courts is not *judicial* power, what is it? Certainly it is not legislative, or executive, or administrative power, or any imaginable combination thereof.

Id. at 565-67 (emphasis in original). *See also Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. at 63-70 (discussing historically recognized exceptions to the provision that the "judicial power" is vested in Article

III courts); *Palmore v. United States*, 411 U.S. 389, 397-404 (1973).

The premise of the petitioners' and respondent's positions—that Article III courts are the only courts that the Constitution authorizes or intends to exercise the judicial power of the United States—has thus been rejected again and again by this Court. This Court has consistently held that courts established pursuant to Article I of the Constitution may, within relevant limits, exercise the judicial power of the United States. Because these Article I courts exercise *judicial* power, it follows logically and, indeed, readily that these courts are "Courts of Law" within the natural meaning of the Appointments Clause. That the Framers did not foresee this development provides no more reason for denying its effect than in other cases, such as the applicability of Article I, § 8, clauses 12 and 13, to an Air Force, or of the Fourth Amendment to telephone calls.

3. Petitioners' concern that this interpretation of the Appointments Clause "would allow the diffusion of appointment power throughout the breadth and depth of the federal bureaucracy" (Pet. Br. 41, 37) is overstated. Interpreting the phrase "Courts of Law" to include Article I courts hardly invites Congress to disregard the mandates of the Constitution and confer appointment authority on virtually every body outside of Congress—even on those that do not fall within the categories of "Courts of Law" or "Heads of Departments." Indeed, the petitioners themselves concede that this case will not affect the selection of many other adjudicatory officers and agents who, like administrative law judges, serve outside these categories within the federal government. *Id.* at 38-39. Petitioners point to nothing but speculation to support the notion that Congress will abuse its authority in granting appointment powers to Article I courts—an authority that it has used appropriately but sparingly in the past.

Sustaining petitioners' position—that Congress cannot constitutionally confer appointment authority on Article I "courts of law"—would create a bizarre and untenable limitation on congressional power. Petitioners' position would mean that Congress can establish an Article I court to act as a judicial body and exercise the judicial power of the United States, but cannot grant this same judicial body the authority to appoint inferior officers necessary for carrying out these judicial duties. Nothing in the Constitution compels such a mechanical and artificial result.

B. Separation-Of-Powers Principles Do Not Bar Congress From Granting The Tax Court Appointment Power As A "Court[] Of Law" Under The Appointments Clause

Respondent will presumably contend that separation-of-powers concerns should lead this Court to deem the United States Tax Court a "Department[]" within the Executive Branch rather than a "Court[] of Law." That position is contrary to Congress' clear and direct action in 1969 and has no sound basis in this Court's separation-of-powers principles. Those principles do not preclude Congress from granting Article I courts, such as the Tax Court, appointment power as "Courts of Law" under the Appointments Clause.

1. The contention that the Tax Court is really a "Department" rather than a "Court" is contrary to both the intent of Congress and the intent of the Framers of the Constitution. In 1969, recognizing the impropriety of "one executive agency . . . sitting in judgment on the determinations of another executive agency" (S. Rep. No. 552, 91st Cong., 1st Sess. 302 (1969)), Congress made clear its intent to change the Tax Court's status from that of (nominally) an executive agency to a "court of record" created under Article I of the Constitution. *See* Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730; S. Rep. No. 552, 91st Cong., 1st Sess. 303 (1969) (Congress intended to "make[] the Tax Court an

Article I court rather than an executive agency"). At the same time, it reaffirmed the power of the "court" thus established—like the many other non-Article III courts that it had created—to appoint inferior officers. Pub. L. No. 91-172, §§ 956, 958, 83 Stat. 732, 733. To suggest that the Tax Court is a Department, merely because it was once deemed a part of the Executive Branch, ignores this unequivocal act of Congress.[13]

Deeming the Tax Court to be a "Department" for purposes of the Appointments Clause likewise contravenes the intent of the Framers. Over a century ago, in *Matter of Hennen*, 13 Peters 230, 257-58 (1839), this Court held that the Framers intended that the constitutional power to appoint inferior officers was "to be exercised by the department of government to which the officer to be appointed *most appropriately* belonged" (emphasis added). Like the court clerks at issue in *Hennen*, the Tax Court's special trial judges "most appropriately belong[]" to the courts of law—not an executive department. The Tax Court exercises *only* judicial power. *See* H. Dubroff, *The United States Tax Court, An Historical Analysis*, Pt. VII, 395-493 (1979); *Stern v. Commissioner*, 215 F.2d 701, 707 (3d Cir. 1954) (the Tax Court "has never been given any administrative powers or functions nor has it ever had any investigatory, regulatory or policy-making duties or powers"). The Tax Court has no nonjudicial functions: it has no administrative duties or powers, no rulemaking authority (other than to adopt rules of procedure for the Tax Court itself, clearly a judicial function), no policy-making discretion, and no authority to conduct investigations or initiate legal actions. Embracing this Article I court within the phrase

[13] If the Tax Court is a "Department," then the Claims Court must be too. But to say that the Tax Court and the Claims Court—and the territorial courts, the District of Columbia courts, the Choctaw and Chickasaw Citizenship Court, and the Court of Private Land Claims among others—are "Departments" within the meaning of the Appointments Clause is surely fantasy.

"Courts of Law"—as opposed to forcing it artificially into the category of an executive "Department"—thus plainly fulfills the purpose of the Framers of the Constitution in adopting the Appointments Clause.[14]

2. Of course, the Framers of the Constitution clearly drafted the Appointments Clause with an eye toward maintaining a balance of power between the President and Congress. *See Buckley v. Valeo*, 424 U.S. 1, 130-131 (1975); *Morrison v. Olson*, 487 U.S. 654, 674 (1988).

[14] In the brief in the *Samuels, Kramer & Co.* case in the Second Circuit, Respondent's counsel attempted to find contrary evidence of the Framers' intent in the provision made by Congress, in one of the first statutes that it passed, for compensating judges (among other officers) of the Northwest Territory. This statute was entitled "An Act for Establishing the Salaries of the Executive Officers of Government, with their Assistants and Clerks." Act of September 11, 1789, ch. 13, 1 Stat. 67. Based on this Act's title, Respondent contended that the Framers viewed non-Article III courts as executive departments for purposes of the Appointments Clause. This reads into the title—perhaps written by a necessarily inexperienced clerk—more than it will bear.

The title of an Act of Congress is rarely a good indicator of legislative understanding and intent (*see Brotherhood of Railroad Trainmen v. Baltimore & Ohio RR.*, 331 U.S. 519, 528 (1947); *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 620 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981); *United States v. Roemer*, 514 F.2d 1377, 1380 (2d Cir. 1975)), especially where, as here, this 1789 enactment dealt with setting salaries for already-established positions and evidenced no deliberate intent to categorize the judges of the courts as "Executive" officers. Indeed, the territorial government of the Northwest Territory was created not by the first Congress assembled under the Constitution, but by the Continental Congress in 1787. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 note (a). This territorial government established before "separation of powers" became a part of the Constitution, unlike the territorial governments later created by Congress, did not maintain strict divisions among the judicial, legislative and executive branches. Indeed, under the Ordinance of 1787, the judges, along with the governor, were the legislative body of the territory, until the population reached a stated figure. This negates any inference that Congress' reference to territorial "executives" in salary-setting legislation carried any substantive meaning at all. *Id.*

But this separation-of-powers concern provides no reason to deprive the Tax Court of its "Court[] of Law" status and undervalue it, instead, with the artificial designation of a "Department."

Sustaining the Tax Court's power, as a court of law, to appoint inferior officers does not pose the "concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence." *Mistretta v. United States*, 488 U.S. at 382; *see Morrison v. Olson*, 487 U.S. at 696. The structure of the Tax Court effectively shields the Chief Judge of the Tax Court from congressional efforts to exert undue influence over the appointments process. Congress has no power to remove Tax Court judges; those judges are appointed by the President, with the advice and consent of the Senate, for terms of 15 years (26 U.S.C. § 7443(b), (e)) and (though subject to impeachment like all civil officers) may be removed only by the President, after notice and opportunity for a public hearing, "for inefficiency, neglect of duty, or malfeasance in office, but for no other cause." 26 U.S.C. § 7443(f). Congress, moreover, has retained no power to review or supervise the Tax Court's appointment of special trial judges; it has no right to demand that a special trial judge, who serves at the pleasure of the Chief Judge of the Tax Court, be selected or subsequently removed.[15] The absence of real separation of powers concerns is thus plain from both this structure and the dearth of evidence, over the 200-year

[15] For this reason, the petitioners' passing reference to this Court's decision in *Bowsher v. Synar*, 478 U.S. 714, 730-31 (1986), is unpersuasive. Pet. Br. 36. In that case, this Court concluded that Congress could not entrust the Comptroller General of the United States with executive powers while retaining the authority to remove him from office. 478 U.S. at 726-32. This concern for the separation of powers between the Legislative and Executive Branches is plainly absent here. The statute involved here gives Congress no power of removal over the Tax Court and its judges.

history of legislative courts, of undue congressional encroachment into the appointments process.[16]

Separation-of-powers principles do not require this Court to treat the Tax Court as a "Department"—rather than a court of law—for Appointments Clause purposes. Respondent's concern that courts without the tenure and salary protections of Article III should not wield appointment authority appears not to be a concern reflected in the Appointments Clause generally or in this case particularly. Indeed, the Appointments Clause allows officers of the Executive Branch, who do not enjoy such tenure or salary protections, to appoint inferior officers as well. Thus, no significant separation-of-powers interest would be served by adopting the novel and highly artificial position that the Tax Court is a "Department[]" rather than a "Court[] of Law" under the Appointments Clause. Neither alternative affects congressional authority over the appointments process in any way or limits the appointment powers of the President in any inappropriate or burdensome way.

CONCLUSION

The "necessary and proper" clause of Article I, § 8, of the Constitution is comprehensive language intended to give Congress the power to see that the governmental structure is coherent and effective. Congress has met that challenge from the earliest days by allocating appropriate parts of the judicial power to Article I courts. To hold, at this late date, that Congress lacks authority to give these courts relevant appointment powers is not a neces-

[16] Vesting such appointment authority in an Article I court likewise does not encroach on powers that rightfully belong to the Article III courts. *Cf. Morrison v. Olson*, 487 U.S. at 673-77 (recognizing that Congress has discretion under the Appointments Clause to provide for interbranch appointments). The appointments at issue here—an Article I court's appointments of its own inferior officers—do not affect or diminish the powers of the Article III courts.

sary construction of the words of the Constitution. It is more inflexible than is appropriate in the construction of a Constitution that was intended to establish a workable government.

This Court should hold that the United States Tax Court is a "Court[] of Law" within the meaning of the Appointments Clause and that Congress may properly vest it with the authority to appoint inferior officers of the United States.

Respectfully submitted,

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March 8, 1991

APPENDIX

THE DISTRICT OF COLUMBIA COURTS

By Section 3 of the Act of February 27, 1801, ch. 15, 2 Stat. 103, 105-106, Congress created the circuit court for the District of Columbia, with three judges "to hold their respective offices during good behaviour." It also provided that "said court shall have power to appoint a clerk of the court." *See also* Act of March 3, 1801, ch. 24 § 9, 2 Stat. 115, 116 (authorizing "the chief judge, with one of the associate justices of the said court, to make such appointments").

In the last half of the nineteenth century, Congress revised the court system in the District of Columbia, and established the Supreme Court of the District. In 1893 (Act of Feb. 9, 1893, ch. 74, 27 Stat. 434), the Court of Appeals of the District was established, following the New York nomenclature. Over the years, there were a number of decisions by this Court in which courts in the District were regarded as "legislative courts," created under Article I. *Kendall v. United States*, 12 Peters 524, 619 (1838); *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 700 (1927); *Ex parte Bakelite Corp.*, 279 U.S. 438, 455 (1929); *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 468 (1930) ("the courts of the District of Columbia are not created under the judiciary article of the Constitution but are legislative courts . . ."). Then, in *O'Donoghue v. United States*, 289 U.S. 516 (1933), the Court held that these District of Columbia courts were created under *both* Article I and Article III. This new approach by this Court does not negate the fact that, pursuant to a number of decisions here, the District of Columbia courts were regarded as Article I courts over a period of 130 years, and Congress must have acted with that understanding.

In addition to the D.C. Superior Court and the D.C. Court of Appeals, there have been, over the years, a number of purely local courts in the District. By 1969, these were designated as the Court of General Sessions, the Juvenile Court, and the D.C. Tax Court. In 1970, Congress established a new set of local courts in the District of Columbia, designated as the Superior Court of the District (which consolidated the previous local courts), and the D.C. Court of Appeals. The judges of these courts were given limited tenure. Congress specifically provided that these courts were "established pursuant to Article I of the Constitution." D.C. Code § 11-101(2), enacted by the Act of July 29, 1970, Pub. L. No. 91-358, 84 Stat. 473, 475. In *Palmore v. United States*, 411 U.S. 389 (1973), this Court decided that these courts were validly created as Article I courts.

By the Act that established these local District of Columbia courts, Congress authorized the judges of these courts to appoint an Executive Officer of the District of Columbia courts, who is responsible for the administration of the court system. D.C. Code Ann. §§ 11-1701, -1703. As with the territorial courts, Congress has stated that these local District of Columbia courts are vested with "judicial power." D.C. Code Ann. § 11-101, enacted by the Act of July 29, 1970, Pub. L. No. 91-358, 84 Stat. 473, 475, 508-510.